Supreme Court, U.S.
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No. 96-706

In the Supreme Court of the United States

OCTOBER TERM, 1996

BANKNOTE CORPORATION OF AMERICA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, a successor employer which began operations with a full workforce comprised primarily of employees who had worked for the predecessor employer, violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by subsequently changing the employees' terms and conditions of employment without bargaining with the unions representing those employees.

2. Whether the Board exceeded its statutory authority in ordering make-whole relief for the violation in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 84 F.3d 637. The decision and order of the National Labor Relations Board (Pet. App. 35-56), and the decision of the administrative law judge (Pet. App. 56-74), are reported at 315 N.L.R.B. 1041.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1996. A petition for rehearing was denied on August 1, 1996. Pet. App. 75-76. The petition for

a writ of certiorari was filed on October 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Until 1990, American Banknote Company (ABN) owned a high-security printing plant in Suffern, New York. Pet. App. 4.[1] Effective February 27, 1990, petitioner acquired the New York plant from ABN. *Id.* at 3. At the time of the acquisition, ABN employed 100 production workers at the plant, with 11 unions representing 11 separate bargaining units. *Id.* at 5, 37. On March 23, petitioner sent a letter to the unions stating that it intended to hire its initial workforce from the pool of employees then working at the plant, but that it was not committing itself to recognizing the unions or to honoring their existing collective bargaining agreements with ABN. *Id.* at 6, 37.

On April 11, 1990, petitioner's president met with representatives of all of the unions. Pet. App. 37. At that meeting, the president informed the unions that ABN would close the plant on April 13, that all former employees would receive applications for employment with petitioner, that petitioner's officials would interview former ABN employees on April 16 and 17, and that petitioner would reopen the plant on April 19. *Id.* at 6. The president also told the union representatives that petitioner intended to establish a more "flexible" operation at the plant, that employees would receive cross-training, and that their

[1] "High-security" printing involves the production of such items as stocks, bonds, visas and traveler's checks. Pet. App. 4.

existing health benefits would be continued for 60 days. *Id.* at 6, 37-38. The president did not otherwise discuss the employees' terms and conditions of employment at the April 11 meeting. *Id.* at 6.

Petitioner interviewed former ABN employees as scheduled on April 16 and 17, 1990, and reopened the plant on April 19 with a full workforce of 52 production and maintenance employees, 50 of whom were former ABN employees. Pet. App. 6-7. On April 23, without first bargaining with the unions, petitioner unilaterally changed the employees' terms and conditions of employment. Thereafter, all of the employees were required to work the same hours, participate in the same pension, vacation, and sick-pay plans, receive the same health and welfare benefits, and observe new company holidays. *Id.* at 7.

2. Acting on unfair labor practice charges filed by three of the 11 unions that represented the former ABN employees (the Unions),[2] the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner, alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1), by unilaterally changing the employees' terms and conditions of employment on April 23, 1990, without first bargaining with the Unions. Pet. App. 7.

The Board, affirming the findings and conclusions of the administrative law judge (Pet. App. 56-72),

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[2] The three complaining unions were New York Lithographers & Photoengravers Union, #1-P, Graphic Communications International Union; District 15, International Association of Machinists & Aerospace Workers; and Graphic Communications International Union, Local 119B-43B, New York. Pet. App. 3.

sustained the General Counsel's complaint. *Id.* at 35-49. To remedy petitioner's unfair labor practice, the Board ordered it, among other things, to rescind, on the Unions' request, the unilateral changes that it implemented on April 23, 1990, to "make affected employees whole" for any losses suffered as a result of the unilateral changes, and to bargain with the Unions upon their request. Pet. App. 49, 70-71.

3. The court of appeals enforced the Board's order. Pet. App. 1-34. The court noted that "it has long been held that under certain circumstances a 'successor' employer may be required to presume that the representative of a bargaining unit continues to enjoy the support of a majority of the employees in that unit and to negotiate with the unit's bargaining representative." *Id.* at 10. Although an ordinary successor "may unilaterally set the *initial* terms and conditions of employment," thereafter the successor must "recognize and bargain with the representative of the predecessor's employees." *Id.* at 11.

The court rejected petitioner's argument that it had no duty to bargain in the absence of a bargaining demand by the Unions. Pet. App. 33. The court reasoned that, because this case involves "a rapid transition period with the immediate hiring of a full employee complement," rather than a gradual transition, "the absence of a bargaining demand * * * does not preclude a finding of a duty to bargain on the part of [petitioner]." *Id.* at 21. The court explained that a prolonged transition period may create "considerable doubt as to whether a union that enjoyed the support of a majority of a predecessor's bargaining unit continues to do so under the successor's operation." *Id.* at 18. Here, by contrast,

because petitioner "hired its full complement of employees at once, shortly after the change in ownership of the business * * * the fact that the majority of the employees in each bargaining unit were former ABN employees was immediately clear to [petitioner]." *Ibid.* Given the rapid transition from ABN's to petitioner's ownership, and petitioner's employment of a workforce comprised primarily of ABN's employees, petitioner had no basis for assuming that the Unions no longer represented the employees' interests. Because petitioner could "easily discern its obligation" to bargain with the Unions, the court concluded that there was "no reason to adopt [petitioner's] formalistic [see 84 F.3d at 646, misquoted at Pet. App. 18] approach" of awaiting a bargaining demand, because "the requirement of a [bargaining] demand would have supplied it with no additional certainty regarding this obligation." *Ibid.*

ARGUMENT

The decision below is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), obligates an employer "to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a), 29 U.S.C. 159(a), provides, in relevant part, that a union "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" is the "exclusive representative[] of all the employees in such unit."

An employer's legal obligation to bargain with the union that represents its employees may extend to that employer's "successor." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987); *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972). A new employer is a successor to the former employer if there is "substantial continuity" between the employers' respective enterprises. *Fall River Dyeing*, 482 U.S. at 43; *Burns*, 406 U.S. at 280 & n.4. The " 'triggering' fact for the bargaining obligation" is "th[e] composition of the successor's work force," *Fall River Dyeing*, 482 U.S. at 46; thus, if a majority of the successor's employees were employed by the predecessor, the successor is obligated to bargain with the union that represents those employees, provided that the bargaining unit continues to be an appropriate one under the successor's operations. *Id.* at 46 & n.12; *Burns*, 406 U.S. at 278-279, 280. A successor employer is not legally bound to honor the predecessor's labor contract, and, as a general rule, is free to set the initial terms upon which it will hire the predecessor's employees. *Burns*, 406 U.S. at 291, 294.[3] Having unilaterally set initial terms, however, the successor is obligated to bargain with the union before making further changes to the employees' terms and conditions of employment. See *id.* at 295.

Applying those settled principles, the court of appeals affirmed the Board's finding that petitioner was a legal successor to ABN, Pet. App. 10-13, 36, and that conclusion is not disputed here. Petitioner was

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[3] Only a so-called "perfectly clear" successor—*i.e.*, a successor who had made it "perfectly clear" from the outset that it plans to retain all (or, perhaps, substantially all) of the predecessor's employees, see *Burns*, 406 U.S. at 294-295—is not free unilaterally to set initial terms.

free unilaterally to set initial terms on which it would hire the former ABN employees, and it did so. *Id.* at 6. However, as the court of appeals correctly held, *id.* at 21-22, petitioner violated Section 8(a)(5) of the Act when, on April 23, 1990, it made further changes in the employees' terms and conditions of employment without bargaining with the Unions. The court of appeals observed that, under this Court's precedents, "the composition of the successor's work force alone may in some circumstances be sufficient to trigger an employer's duty to bargain." Pet. App. 20 (citing *Fall River Dyeing*, 482 U.S. at 46). Applying that principle here, the court held that petitioner's duty to bargain "attached as of April 19, 1990, when [petitioner] hired its employees. [Petitioner] was thereafter no longer free to act unilaterally with respect to mandatory subjects of collective bargaining, and [petitioner's] imposition of new terms and conditions of employment on April 23 was unlawful." Pet. App. 21-22.

b. Petitioner's contention (Pet. 9-24) that a bargaining demand from the Unions was necessary to trigger its obligation to bargain, and that the court of appeals' decision to the contrary creates a decisional conflict, is without merit. A successor employer's obligation to bargain with the union that represents its predecessor's employees flows from Sections 8(a)(5) and 9(a) of the Act. See pp. 5-6, *supra*. Neither statutory provision requires an outstanding bargaining demand as a condition precedent to a successor's bargaining obligation. Rather, the " 'triggering' fact" that creates the bargaining obligation is the successor's hiring of a workforce the majority of which were unionized employees of the predecessor. *Fall River Dyeing*, 482 U.S. at 46 &

n.12. Here, petitioner's bargaining obligation was triggered on April 19, when petitioner had hired virtually all of its workforce from among ABN's unionized employees. Thus, petitioner's position on that date was akin to that of an employer confronted with a newly selected bargaining representative; such an employer is not free thereafter to change conditions of employment without bargaining with the union.

Contrary to petitioner's contention (Pet. 11-12, 15), neither *Burns* nor *Fall River Dyeing* requires a bargaining demand in order to trigger petitioner's duty to bargain in this case. *Burns* involved a successor employer that began providing security services at an aircraft plant one day after the predecessor's service contract expired. On its first day of operations, the successor employer in *Burns*, like petitioner in this case, had in place its entire workforce, a majority of which had worked for the predecessor, and the predecessor's employees had recently voted for union representation in a Board election. 406 U.S. at 274-275. The Court held that the successor's obligation to bargain with the union "mature[d]" when "it had selected its force of guards," for, at that point, it was "evident" that "the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act." *Id.* at 295; see also *id.* at 278-279. Although the union had made a demand for recognition upon the successor some two weeks after it had begun operations (*id.* at 275-276), the Court's holding did not condition the existence of the successor's bargaining obligation upon that demand; rather, the Court stated that, "where the bargaining unit remains unchanged and a majority of the employees hired by the new em-

ployer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union." *Id.* at 281. In *Fall River Dyeing*, the Court reaffirmed the central holding of *Burns*, explaining: "In *Burns*, the Court determined that the successor had an obligation to bargain with the union because a majority of its employees had been employed by [the predecessor]. The 'triggering' fact for the bargaining obligation was this composition of the successor's work force." 482 U.S. at 46 (citation omitted).

Petitioner's contention that, under *Fall River Dyeing*, petitioner has no bargaining obligation in the absence of a demand by the Unions is incorrect. *Fall River Dyeing* involved special rules governing a successor's obligation to bargain in the context of gradual hiring during a prolonged start-up period, 482 U.S. at 46-53, and those rules are inapposite to a case such as this one involving a rapid start-up with a full complement of employees. As the *Fall River Dyeing* Court observed, where hiring occurs gradually, there may be uncertainty as to the correct date for making the assessment, on which the duty to bargain turns, regarding whether a majority of a successor's workforce is comprised of the predecessor's employees. *Id.* at 47. The Court sustained the Board's rule requiring that, in the context of a gradual transition, the determination be made when the successor has hired a "substantial and representative complement" of its employees, as opposed to when the successor has hired a full complement of employees. *Id.* at 47-52. The Court further concluded that "[t]he successor's duty

to bargain at the 'substantial and representative complement' date is triggered only when the union has made a bargaining demand," and that, "[u]nder the 'continuing demand' rule, when a union has made a premature demand that has been rejected by the employer, this demand remains in force until the moment when the employer attains the 'substantial and representative complement.' " *Id.* at 52.

In the context of a *Fall River Dyeing*-type successorship, the requirement of a bargaining demand serves a useful purpose. Where there has been "a start-up period by the new employer while it gradually builds its operations and hires employees" (482 U.S. at 47), there is, correspondingly, a significant period of time that elapses between the successor's initial resumption of operations and its hiring of a "substantial and representative complement" of employees. During the interval leading up to the "substantial and representative complement" date, the union lacks authority to act in its former capacity as the bargaining representative of the unit employees; further, during that interval, the successor may lawfully alter the employees' terms and conditions of employment without bargaining with the union. In these circumstances, the union, for practical reasons, may well have lost interest in continuing to represent the bargaining unit by the time the successor has hired a "substantial and representative complement" of employees. It is therefore reasonable, in such successorships, to require the union, if in fact it remains interested in representing the bargaining unit, to manifest that continued interest by making a bargaining demand upon the successor.

Different considerations apply, however, in a non-*Fall River* successorship. Where, as here, the interval

between the predecessor's demise and the successor's resumption of operations is but a matter of days, and the successor resumes operations with a full complement of employees, the union experiences only a brief period of time during which it lacks authority to represent the bargaining unit. Further, where, as here, the successor elects to operate the enterprise under terms of employment that differ only minimally from the predecessor's, the fruits of the union's contract negotiations with the predecessor remain essentially intact. In these circumstances, unlike in those presented by a *Fall River Dyeing* successorship, there is little reason to question the union's continued interest in representing the bargaining unit.[4] Accordingly, the employer's obligation not to make further unilateral changes without bargaining with the union quickly becomes manifest, and it would elevate form over substance nonetheless to require the union to issue the successor a bargaining demand. See Pet. App. 18.

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[4] Although petitioner asserts (Pet. 22-23) that "unions often walk away from representation for a variety of business reasons," and that "six of the eleven unions at ABN did not pursue representation of [petitioner's] employees," those unions may well have concluded that establishment of a meaningful bargaining relationship with petitioner was improbable in light of its unlawful unilateral changes. Petitioner also asserts (*ibid.*) that it "reduced by half an already small, balkanized ABN workforce," and that "[a] union could easily have decided it was not worth the trouble to represent units with only a few employees." However, as petitioner acknowledges (Pet. 22), although the bargaining unit represented by Machinists District 15 contained only two employees after petitioner reopened the plant, nonetheless, District 15 filed unfair labor practice charges against petitioner in protest of its unilateral changes (Pet. App. 3), thereby demonstrating that it had not abandoned representation of the unit.

In sum, the court of appeals correctly ruled, consistent with *Burns* and *Fall River Dyeing*, that petitioner's obligation not to make unilateral changes without bargaining was triggered by its hiring, on April 19, of a full workforce a majority of which was comprised of former ABN unionized employees, and that that legal obligation did not depend on the presence of a bargaining demand by the Unions. See Pet. App. 19.[5]

Contrary to petitioner's contention (Pet. 12-13), the decision below is also consistent with *NLRB* v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039 (6th Cir. 1972), and *NLRB* v. *Houston Building Service, Inc.*, 936 F.2d 178 (5th Cir. 1991), cert. denied, 502 U.S. 1090 (1992). In *Wayne Convalescent Center*, the court held that the successor acted lawfully in establishing initial terms of employment without first bargaining with the union, and that the successor was not justified in refusing, on the basis of an alleged good-faith doubt as to the union's majority status, to honor the union's subsequent demand for recognition

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[5] Petitioner's reliance (Pet. 11, 21) on *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), is misplaced. In that case, which did not involve a successorship, the Court held that the employer did not violate the NLRA in refusing to negotiate with federal labor conciliators during a strike called by the union, because there was "no evidence that the Union gave to the employer, through the conciliators or otherwise, any indication of its willingness to bargain or that [the employer] knew that [the conciliators] represented the Union." *Id.* at 298. While some manifestation of a union's "willingness to bargain" may be necessary to a finding that an employer unlawfully refused to bargain with the union in the setting of an ongoing work stoppage, this case does not involve a work stoppage, nor any other reason to believe that the Unions were unwilling to bargain.

and execution of the contract previously negotiated with the predecessor. 465 F.2d at 1042-1044. This case does not involve any challenge to petitioner's unilaterally adopted initial terms, nor any good-faith doubt as to the fact that a majority of petitioner's employees had worked for ABN.

In *Houston Building Service*, the court stated that, where a majority of the employees in "a representative workforce" of the successor was employed by the predecessor, the successor is obligated to bargain with the union that represents those employees, "assuming that the union has made a bargaining demand." 936 F.2d at 180. The court, however, had no occasion to consider whether a successor's unilateral changes may be unlawful even in the absence of a bargaining demand, given that the union in that case had made such a demand. *Ibid.*[a]

2. Petitioner also contends (Pet. 24-28) that the Board exceeded its statutory authority in fashioning the remedy in this case, insofar as the Board ordered petitioner to make employees whole for losses suffered as a result of its unlawful unilateral changes. Petitioner's claim, however, is not properly presented, and, in any event, lacks merit.

Petitioner did not initially challenge the Board's remedy on appeal. It was not until petitioner filed a petition for rehearing in the court of appeals that it contended that the Board exceeded its authority in ordering a make-whole remedy. The court of appeals denied the petition. Pet. App. 75-76. The court of

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[a] Petitioner also suggests (Pet. 13) that the Board's decision in this case is inconsistent with its decision in *Royal Midtown Chrysler Plymouth, Inc.*, 296 N.L.R.B. 1039 (1989). Any such inconsistency would not, however, warrant this Court's intervention. Cf. Sup. Ct. R. 10(a) and (c).

appeals has not ruled on the remedial issue, and this Court should decline to review it without "the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992); see also *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's challenge to the remedy the Board ordered is without merit. Because petitioner succeeded to ABN's bargaining obligation on April 19, 1990, it then stood in the shoes of its predecessor, and thereafter was subject, as ABN would have been, to all prevailing collectively bargained employer obligations. While petitioner had the right unilaterally to change any initial terms and conditions of employment on which it opened for business on April 19, the court of appeals held that "[petitioner] established only two 'initial' terms here: that it would continue employee health benefits for sixty days, and that it would introduce greater 'flexibility' in the workplace." Pet. App. 22 n.5. Thus, on April 19, the prevailing terms were virtually identical to ABN's. Petitioner then unlawfully altered the prevailing terms on April 23.[7] The Board, in an effort to restore the pre-April 23 status quo, ordered petitioner to rescind any unilateral changes that it had not announced prior to opening on April 19, and to make the unit employees whole for any losses suffered as a result of those changes. Pet. App. 49, 70-71. Such make-whole relief is a routine, reasonable exercise

[7] Petitioner on April 23 instituted, *inter alia*, a new health and welfare benefits program, and thus did not even "act consistently with its pre-April 19 announcement to employees that the predecessor's health benefits would continue in effect for 60 days." Pet. App. 49 n.9.

of the Board's remedial authority. See, *e.g.*, *Blitz Maintenance, Inc.*, 297 N.L.R.B. 1005, 1005 n.2, 1010, enforced mem., 919 F.2d 141 (6th Cir. 1990); *Houston Building Service, Inc.*, 296 N.L.R.B. 808, 814-815 (1989), enforced, 936 F.2d 178 (5th Cir. 1991), cert. denied, 502 U.S. 1090 (1992).

There is no merit to petitioner's contention (Pet. 24, 25-26) that the Board's make-whole order effectively binds it to the terms of ABN's labor contracts, in contravention of Section 8(d) of the Act. Section 8(d), 29 U.S.C. 158(d), provides, in relevant part, that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." See also *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). The Board's remedy is consistent with that principle, for petitioner itself, when it opened for business on April 19 without having made any substantial changes in the prevailing terms of employment, elected to adopt the bulk of ABN's employment terms. Moreover, the Board's order requires petitioner to continue to observe its chosen terms only until it has bargained with the Unions for new terms. See Pet. App. 71. If, after good-faith negotiations, the parties reach a bargaining impasse, petitioner will be free unilaterally to implement changes that are "reasonably comprehended within [its] pre-impasse proposals." *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), enforced *sub nom. American Federation of Television & Radio Artists* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

Petitioner further errs in contending (Pet. 26, 28) that the Board's remedy is inconsistent with *Burns*, *supra*. There, the Court declined to enforce the

Board's make-whole remedy because, in the circumstances of that case, the Court found it "difficult to understand how [the successor] could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had * * * no outstanding terms and conditions of employment from which a change could be inferred." 406 U.S. at 294-296. *Burns* dealt with the terms on which the successor initially hired its employees. Here, by contrast, petitioner had already completed its hiring, had "outstanding" employment terms in place before April 23, and its unilateral changes on that date were a clear departure from those terms. Because the Board's remedial determinations "merit the greatest deference," *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994), the court of appeals correctly enforced the Board's order.[8]

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[8] Contrary to petitioner's suggestion (Pet. 26), the decision below is not inconsistent with *NLRB* v. *Dent*, 534 F.2d 844 (9th Cir. 1976). There, the Board found that the successor unlawfully unilaterally lowered the employees' wages, and the Board ordered it to pay the employees backpay based on their former wage rate. *Id.* at 845. The court agreed with the Board that the successor's unilateral changes constituted an unfair labor practice (*id.* at 846), but declined to enforce the Board's backpay award because the court found it "clear," on the facts presented, that "the [successor] would not have agreed to the wage rates which had existed under the previous contract." *Id.* at 847. Here, by contrast, petitioners effectively assented to ABN's wage rates and continued to apply them when it reopened the plant on April 19 with a full complement of employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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